

City of Houston, Texas, Ordinance No. 2001-_____

AN ORDINANCE AMENDING ORDINANCE NO. 2000-1115, RELATING TO EXCAVATING IN THE PUBLIC WAY; APPROVING RULES AND REGULATIONS IMPLEMENTING THE ORDINANCE; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; CONTAINING A REPEALER; AND DECLARING AN EMERGENCY.

* * * * *

WHEREAS, the City Council adopted Ordinance No. 2000-1115 (the "Ordinance") on December 20, 2000, to:

1. Provide a means for controlling the excavation and restoration of the public way whereby the structural integrity of the public way is maintained in accordance with acceptable standards and specifications;
2. Provide for safe and orderly movement of vehicular traffic and pedestrians on the public way; and
3. Provide a means whereby the public is notified of excavations in the public way and of the responsible party; and

WHEREAS, at the time the City Council adopted the Ordinance, a request was pending before the Attorney General of the State of Texas for an interpretation of the applicability of Chapter 283 of the Texas Local Government Code to street excavation ordinances and entities other than certificated telecommunications providers; and

WHEREAS, during the process of adoption, a motion was made with respect to the Ordinance as follows:

"Motion to request that within 30 days of an Attorney General's opinion, should

it be determined that Chapter 283 of the Texas Local Government Code does not require said ordinance to be applied to non telecommunication utilities, the Street Cut Ordinance be returned to Council for consideration of amendments consistent with the Attorney General's opinion."; and

WHEREAS, the City received the Attorney General opinion on or about January 15, 2000; and

WHEREAS, amendments to the Ordinance are recommended consistent with the Attorney General's opinion and otherwise applicable federal and state law; and

WHEREAS, the City Council finds that the amendments will effectuate the intent and purpose of the Ordinance and of the City Council in its initial adoption of the Ordinance; and

WHEREAS, the original effective date of the Ordinance would be February 20, 2001; and

WHEREAS, the City Council determines that it is necessary and appropriate to allow additional time before the Ordinance becomes effective to allow affected parties to comply with its terms; **NOW, THEREFORE**,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings contained in the preamble of this Ordinance are determined to be true and correct and are hereby adopted.

Section 2. That Section 2 of Ordinance No. 2000-1115 is hereby amended by amending the definition of "Permit" in Section 40-121 of the Code of Ordinances, as amended

by Ordinance No. 2000-1115, to read as follows:

“Permit means a current and valid authorization issued under division 2 or division 4 of this article.”

Section 3. That Section 2 of Ordinance No. 2000-1115 is hereby amended by amending subsection (a) of Section 40-137 of the Code of Ordinances, as amended by Ordinance No. 2000-1115, by deleting the word “Each” and adding the following clause to the beginning of the subsection:

“Unless otherwise provided in the rules and regulations promulgated under section 40-128 of this Code, each”

Section 4. That Section 2 of Ordinance No. 2000-1115 is hereby amended by amending the third sentence of Section 40-160 of the Code of Ordinances, as amended by Ordinance No. 2000-1115, to read as follows:

“Inspections shall be performed at permittee's expense by an approved inspector pursuant to the rules and regulations promulgated under section 40-128 of this Code.”

Section 5. That Section 2 of Ordinance No. 2000-1115 is hereby amended by adding a new Division 4 to Article V of Chapter 40 of the Code of Ordinances, as amended by Ordinance No. 2000-1115, which reads as follows:

“DIVISION 4. GENERAL PERMITS

Sec. 40-163. Availability.

Notwithstanding any provision of this article to the contrary, an excavation shall be authorized by general permit if each of the following conditions is satisfied:

- (1) The excavation will not occur in any public way that has been constructed, reconstructed, repaved, or resurfaced in the preceding period of five years, as measured from the date of acceptance by the public works construction entity;
- (2) The excavation will not occur inside the central business district, as defined in section 42-1 of this Code;
- (3) The excavation will not involve an area larger than either 400 square feet or 200 linear feet;
- (4) The excavation will be performed by the owner's own employees or by employees of a contractor who are regularly assigned to perform work for the owner and are knowledgeable regarding the owner's work procedures and the requirements of this article and the rules promulgated under section 40-128 of this Code;
- (5) The following conditions will be complied with, as applicable:
 - a. The owner has posted a bond with the city that meets the requirements specified in the rules and regulations promulgated under section 40-128 of this Code;
 - b. If a contractor will perform any part of the excavation, the owner, through a document executed by a duly authorized representative:
 - i. Assumes all responsibility for the excavation performed by the contractor;
 - ii. Waives any claim or defense as between the owner and the city that the owner is not responsible for the violation of any applicable requirement of this article or rules and regulations promulgated under section 40-128 of this Code; and
 - iii. Assumes all responsibility for restoration and repair of the public way required by this article or the rules and regulations promulgated under

section 40-128 of this Code, including but not limited section 40-140 of this Code if the contractor fails to comply in any regard; and

- c. The owner or contractor posts and maintains notices in the vicinity of the excavation in the time, place, and manner prescribed in the rules and regulations promulgated under section 40-128 of this Code;
 - d. The owner or contractor when working on a public way that is designated as a major thoroughfare or a collector street on the major thoroughfare and freeway plan as defined in Section 42-1 of this Code has obtained a valid lane or street closure permit from the City Traffic Engineer for the excavation; and
 - e. The owner or contractor will maintain pedestrian and vehicular access to all abutting and affected properties.
- (6) The excavation will be inspected by an employee of the owner or by an independent third party, both of whom are qualified pursuant to the rules and regulations promulgated under section 40-128 of this Code; and
- (7) The excavation will be completed within 14 days of first breaking pavement.

Sec. 40-164. Registration for permit.

(a) An owner shall be entitled to a general permit as provided in this section upon demonstrating compliance with each of the requirements of section 40-163 of this Code and this section. The owner shall register for a general permit by submitting a registration form to the city engineer. The registration shall be on a form prescribed by the director and shall be signed and sworn to by the owner before an officer authorized to administer oaths and shall include the following:

- (1) The name, assumed name, or business name, business type (corporation, partnership, individual/sole proprietor, or other) of the owner;

- (2) The owner's mailing address (and street address if different), telephone number, facsimile number, and e-mail address;
- (3) A statement that each person executing the application is fully authorized to act on behalf of and bind his principal in executing and filing the application;
- (4) A statement that the owner accepts and obligates itself to the following release and indemnification provisions on behalf of itself and any contractor acting on its behalf:

'RELEASE

PERMITTEE AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THE PERMIT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S ACTUAL OR ALLEGED JOINT OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

INDEMNIFICATION

PERMITTEE AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS PERMIT, INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- (i) **PERMITTEE'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', PRINCIPALS', OR SUBCONTRACTORS OF PERMITTEES' (COLLECTIVELY IN NUMBERED PARAGRAPHS (i)-(iii), "PERMITTEE") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;**
- (ii) **THE CITY'S AND PERMITTEE'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER PERMITTEE IS IMMUNE FROM LIABILITY OR NOT; AND**
- (iii) **THE CITY'S AND PERMITTEE'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER PERMITTEE IS IMMUNE FROM LIABILITY OR NOT.**

PERMITTEE SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THE PERMIT AND FOR FOUR YEARS AFTER THE PERMIT TERMINATES.

WHERE APPLICABLE, THE PROVISIONS OF SECTION 283.057 OF THE TEXAS LOCAL GOVERNMENT CODE SHALL CONTROL IN LIEU OF THE FOREGOING; ADDITIONALLY, TO THE EXTENT THAT THE APPLICANT HOLDS A CURRENT AND VALID UTILITY FRANCHISE FROM THE CITY, THE RELEASE AND INDEMNIFICATION PROVISIONS OF THE FRANCHISE SHALL CONTROL IN LIEU OF THE FOREGOING.'

- (5) The identity of the contractor that will perform the work on behalf of the owner as required by the rules and regulations promulgated under section 40-128 of this Code;
- (6) The 24-hour telephone number at which the owner's representative who will respond to emergencies may be

contacted;

- (7) The name, mailing address, telephone number, facsimile number, and e-mail address of a person who is authorized to receive all notices authorized to be given by the city under this article to the owner;
- (8) Evidence of insurance as required in section 40-147 of this Code;
- (9) The work warranty as required by section 40-140 of this Code.

(b) The city engineer shall initially review each registration to determine whether it is complete. The city engineer shall return an incomplete registration with an explanation of the deficiencies. A complete registration shall become effective as a permit on the 14th day after the complete registration is received by the city engineer, unless the owner is notified that the permit has been disapproved.

(c) The city engineer shall disapprove the registration if he determines that the conditions of this article are not satisfied. If a registration is disapproved, the city engineer shall notify the owner of the grounds for denial.

(d) A general permit shall be effective for one year after its issuance for excavations that comply with section 40-163 of this Code.

Sec. 40-165. Conditions of general permit.

(a) An owner who has registered for a general permit that has not been disapproved within 14 days of its filing with the city engineer shall be permitted to conduct excavations that comply with section 40-163 of this Code under the following conditions:

- (1) All of the requirements of section 40-163 of this Code continue to be satisfied with respect to each excavation;
- (2) The permittee notifies the city engineer of the location of each excavation and the identity of the person performing the excavation as prescribed by the rules and regulations promulgated under section 40-128 of this Code not later than 72

hours before the excavation begins; and

- (3) The permittee obtains all other permits required by other applicable federal and state statutes and city ordinances for the excavation.

(b) A general permit shall no longer be valid if an excavation is performed in a manner that does not comply the requirements of section 40-163 of this Code. All excavations that do not qualify for a general permit shall require a permit issued pursuant to division 2 of this article.

(c) Nothing in this section shall relieve a permittee of the obligation to comply with the applicable notification requirements of the Texas Underground Facility Damage Prevention and Safety Act with respect to each excavation authorized by a general permit.

(d) The provisions of division 2 of this article are applicable to a general permit other than the following: 40-136, 40-141(b) and -(c), 40-142(a), and 40-148 of this Code. All of the provisions of division 3 are applicable to a general permit.

Sec. 40-166. Default under general permit; revocation.

The performance of an excavation that is not authorized by a general permit shall be unlawful unless authorized by a permit issued pursuant to division 2 of this article and shall constitute an event of default under the general permit. Upon the occurrence of three events of default under a general permit, the general permit shall be revoked, after notice and hearing as provided in section 40-126 of this Code. An event of default under this section shall be considered the same as an 'unpermitted excavation' pursuant to section 40-146(b) of this Code.

Sec. 40-167. Reserved."

Section 6. That the document attached to this Ordinance entitled *RULES AND REGULATIONS FOR CHAPTER 40, ARTICLE V HOUSTON CITY CODE* is hereby approved by the City Council for implementation by the Director of Public Works and

Engineering under Article V of Chapter 40 of the Code of Ordinances, Houston, Texas, as adopted by Ordinance 2000-1115 on December 20, 2000. This approval supersedes any requirement of Section 40-128 of the Code of Ordinances, Houston, Texas, for publication and/or approval of the rules and regulations in a different manner.

Section 7. That, if any provision, section, subsection, sentence, clause, or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

Section 8. All ordinances in conflict herewith are repealed to the extent of the conflict only.

Section 9. That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor; however, in the event that the Mayor fails to sign this Ordinance within five days after its passage and adoption, it shall take effect in accordance with Article VI, Section 6, Houston City Charter.

PASSED AND ADOPTED this ____ day of _____, 2001.

APPROVED this ____ day of _____, 2001.

Mayor of the City of Houston

Pursuant to Article VI, Section 6, Houston City Charter, the effective date of the foregoing Ordinance is _____.

City Secretary

Prepared by Legal Dept. _____
DFM:dfm 01/12/2001 Senior Assistant City Attorney
Requested by Thomas J. Rolon, Director, Public Works & Engineering
L.D. File No. 0420000008001
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RULES AND REGULATIONS

The Rules and Regulations attached hereto show changes from a draft previously circulated for public comment to facilitate City Council consideration of the Rules and Regulations. Additions are shown by underlining text and deletions are shown by ~~strikeout~~ text. Upon adoption, the Rules and Regulations will be available in the form finally approved by the City Council.